

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Indianapolis, IN

BALES MECHANICAL, INC.¹
Employer

and

Case 25-RD-1430

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION LOCAL UNION NO. 20,
a/w SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, AFL-CIO
Union

and

GARY STOPPER
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing commenced on April 15, 2003, and resumed and concluded on May 8, 2003,² before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.³

¹ The Employer's name has been amended to reflect its correct legal name.

² The hearing was closed on April 15, 2003 without the receipt of evidence. By order of the Acting Regional Director dated April 24, 2003, the hearing was reopened on May 8, 2003; testimony was received; and the hearing closed later that day. The Union has objected to the reopening of the record, and urges that the Regional Director reconsider this decision. The Union argues that the Petitioner failed to cooperate in the Region's processing of his petition by failing to appear at the April hearing, and therefore the Region should dismiss the petition rather than reopen the record. The Regional Director has broad discretion to investigate election petitions and to conduct hearings, as he deems proper, Rules and Regulations of the National Labor Relations Board, Series 8 as amended, Section 102.63. A record can be reopened to obtain "evidence which the Regional Director . . . believes should have been taken at the hearing . . .," Rule 102.65(e)(1). The Acting Regional Director ordered the record reopened in order to develop an evidentiary basis upon which to determine the issue in dispute between the parties. The undersigned is unaware of any case law, and the Union has cited none, which stands

I. ISSUES

Bales Mechanical, Inc. (herein the "Employer" or "Bales") and Gary Stopper (the "Petitioner") both assert that in the present case the only appropriate unit for a decertification election is a unit consisting of only Bales' employees. Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO (the "Union") contends that the only appropriate bargaining unit is one consisting of all of the employees of the multi-employer bargaining association known as the Sheet Metal and Air Conditioning National Association of Michiana, Inc. ("SMACNA"), to whom the Employer had earlier delegated its bargaining authority.

II. DECISION

For the reasons discussed in detail below, including the Employer's timely withdrawal from multi-employer bargaining, it is concluded that a single-employer unit consisting of the Employer's employees constitutes an appropriate unit for purposes of a decertification election.

for the proposition that in decertification proceedings, the absence of an employee-petitioner from a pre-election hearing requires the dismissal of the petition. The Union argues that it has suffered legal prejudice as a result of the reopening of the record because it incurred additional expense and inconvenience. However, United States Courts of Appeals have recognized that inconvenience and expense caused a party by having to defend itself a second time in litigation does not constitute legal prejudice, Westlands Water District v. United States, 100 F.3d 94 (9th Cir. 1996); Hamilton v. Firestone Tire and Rubber Co., 679 F.2d 143 (9th Cir. 1982).

³ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the resumption of the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁴

All full-time and regular part-time journeymen, residential journeymen, installers, apprentices, residential apprentices, pre-apprentices, and classified sheet metal workers employed by Bales Mechanical, Inc.; BUT EXCLUDING all office clerical employees, all professional employees, all guards and supervisors as defined in the Act, and all other employees.

The unit found appropriate herein consists of approximately three employees. The history of collective bargaining is discussed in greater detail below.

III. STATEMENT OF FACTS

The Employer installs, repairs and maintains residential heating and air conditioning systems. The Employer performs work in and around the South Bend, Indiana area. The Employer's owner is the company's sole supervisor of its three employees. The Employer's owner retains sole control over and management of the employees. Bales' employees have little, if any, contact or interaction with other members of the Union and do not work on projects with employees of other SMACNA contractors.

On April 23, 1999, Bales entered into a collective bargaining agreement which had been negotiated between the Union and SMACNA. That agreement expired on June 30, 2000. A subsequent collective bargaining agreement was negotiated between SMACNA and the Union on behalf of Bales and other SMACNA members, and it is in effect by its terms through June 30, 2003.

Both contracts contain a provision (Article XIV, Section 5) which states that execution of the contract constitutes an adoption of its terms and a delegation of bargaining authority to SMACNA. The same provision requires that any member who desires to withdraw membership and bargaining authority from SMACNA must serve written notice of such intent upon SMACNA and the Union at least 150 days prior to the expiration of the contract. To be valid under the terms of the parties' current contract, notice of an intent to withdraw from the association and to withdraw its bargaining authority, must have been received by the parties no later than January 31, 2003.

⁴ The parties stipulated at the hearing to the job classifications that constitute the appropriate unit, regardless of whether the unit is found to be comprised of all of the employees of SMACNA employers or just Bales' employees.

Addendum I, Section 3 of the parties' contract states:

Section 3. Recognition Clause of a 9(a) Collective Bargaining Agreement

Inasmuch as the Union has submitted proof and the Employer's bargaining representative is satisfied that the Union represents a majority of its employees in the bargaining unit described herein, the representative recognizes the Union as the exclusive collective bargaining agent for all employees within that bargaining unit, on all present and future jobsites within the jurisdiction of the Union, unless and until such time as the Union loses its status as the employee's (sic) exclusive representative as a result of an NLRB election, requested by the employees. However, in the event a petition is filed with the NLRB, either before or after the expiration of this Agreement, the Union and the Employer (including any Employer assenting to this Agreement subsequent to its effective date) agree that the appropriate bargaining unit shall consist of all employees of all Employers signatory to this Agreement (emphasis added).

On January 30, 2003, the Employer sent a letter to SMACNA and the Union indicating its intent to withdraw from SMACNA at the conclusion of the contract, and to simultaneously withdraw bargaining authority from SMACNA. The letters were sent by overnight mail through a FedEx delivery service. The Union received its letter on January 31, 2003. The date on which SMACNA received its letter is not known. The Union's Business Representative testified that approximately one week after he received the letter, he telephoned SMACNA's Executive Director who acknowledged that she, too, had received a similar letter, but no date of SMACNA's receipt was discussed.⁵ On March 19, 2003, the Union sent the Employer a letter requesting individual bargaining concerning a successor collective bargaining agreement. No negotiations have apparently occurred to date.

IV. DISCUSSION

The sole issue in dispute between the parties is whether the appropriate unit for purposes of a decertification election is one comprised of only Bales' employees, or all employees employed by members of SMACNA. It is a longstanding policy of the Board that the unit for decertification elections must be coextensive with the recognized or certified bargaining unit, absent extenuating circumstances. In Arrow Uniform Rental, 300 NLRB 246 (1990), the Board noted that one of these extenuating circumstances occurs with a member of a multi-employer association has timely withdrawn its membership in and bargaining authority from the association:

With respect to a recognized multiemployer unit, however, an exception is made for an employer who has timely withdrawn from the multiemployer association. Thus, a petition covering a unit of a single employer's employees will not be dismissed on the ground that it is not coextensive with the multiemployer unit if

⁵ No representative of SMACNA was called by either party to establish SMACNA's date of receipt of the Employer's notice-of-withdrawal letter.

the petition is filed . . . after the employer's timely withdrawal, *Id.* at 247; See also Union Fish Co., 156 NLRB 187 (1965).

Thus, the timeliness of the Employer's withdrawal from the multi-employer bargaining unit is critical to a determination of the appropriate unit.

A. The Employer's Notice of Withdrawal

In Retail Associates, Inc., 120 NLRB 388 (1958), the Board established the guiding principle that for withdrawal from a multi-employer association to be timely, an employer must give unequivocal written notice of its intent to withdraw consistent with the terms of the parties' contract, and multi-employer negotiations for a new contract must not have already commenced *Id.* at 395. Here, there is no evidence that the Union and SMACNA had begun negotiations for a successor contract at the time the Employer mailed its withdrawal notices.

For Bales' withdrawal notice to be found timely under the parties' contract, Bales must have given both SMACNA and the Union notice of its intent to withdraw at least 150 days prior to the contract's expiration (June 30, 2003). The Employer sent both SMACNA and the Union notice of its intent to withdraw on January 30, 2003. The Union received the Employer's notice on January 31, 2003, the 150th day preceding the contract's expiration.

The date on which SMACNA received the Employer's notice of intent to withdraw is not known. However, the record indicates that Bales sent its notice to both the Union and SMACNA on January 30, 2003, by overnight delivery with FedEx, and the evidence is uncontroverted that SMACNA received its notice at some point in time.

In addition, the Union treated SMACNA's receipt as having been timely since it sent the Employer a letter several months later requesting individual bargaining. In I.C. Refrigeration Service, Inc., 200 NLRB 687, 689-90 (1972), the Board held that a union's willingness to engage in individual bargaining is "a prime indicator of a union's consent or acquiescence" and that "such individual bargaining demonstrates a union's acceptance of the employer's withdrawal." Based upon the totality of evidence it is concluded that SMACNA also received its letter from the Union on January 31, 2003, and consequently, the Employer's notice to SMACNA of membership and bargaining-authority withdrawal, was timely.

B. The Appropriate Bargaining Unit

The Employer having given timely notice of its intent to withdraw from multi-employer bargaining, the remaining issue is the scope of the unit appropriate for a decertification election. The Union argues that the Board should defer to the agreement of the parties as evidenced in Addendum I, Section 3 of the parties' contract. As stated earlier, Addendum I provides in pertinent part that:

...in the event a petition is filed with the NLRB, either before or after the expiration of this Agreement, the Union and the Employer ... agree that the appropriate bargaining unit shall consist of all employees of all Employers signatory to this Agreement.

It would be contrary to the purposes of the Act, however, to permit employees of other employers, who will not be bound by the terms of any individual contract negotiated between the Union and Bales, to determine whether Bales' employees shall remain unionized.⁶ The Board will not honor private agreements where they contravene the purposes of the Act,⁷ or where they create a bargaining unit which the Board would not find appropriate in an initial representation proceeding, Albertson's, Inc., 270 NLRB 132 (1984).⁸ In the case at hand, the preponderance of record evidence indicates that if an initial representation petition were filed seeking an election within a unit comprised of all employees of the SMACNA employers plus the employees of Bales, the Board would not find the unit appropriate because Bales' employees lack a community of interest with SMACNA employees. Bales' employees do not perform work on projects alongside employees of SMACNA employers, nor do they appear to have any other work-related contact with the employees. Bales alone directs the work of its employees and SMACNA employers have no control over these employees. Bales performs HVAC work in the residential field, while many of the SMACNA contractors work in commercial and industrial settings. Since a single-employer unit is presumptively appropriate⁹ and no evidence to the contrary exists in this case, it is concluded that the unit appropriate for decertification is a unit limited to the employees of the Employer described above in Section II.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the above unit, at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.

⁶ Since there are approximately 267 employees within the multi-employer unit, and three employees within a unit comprised of Bales' employees only, there is no question that the multi-employers' employees could force continued union representation upon Bales employees, despite a desire on their part to the contrary.

⁷ See for example, Times-World Corporation, 151 NLRB 947 (1965) and Drukker Communications, Inc., 258 NLRB 734 (1981), where the Board declined to honor private agreements which would have denied the rights enumerated in Section 7 of the Act to employees otherwise entitled to such rights.

⁸ Tom Kelly Ford, 264 NLRB 1080 (1982), cited by the Union, is inapposite since in that case the unit agreed upon between the parties was not one inappropriate for collective bargaining.

⁹ Central Transport, Inc., 328 NLRB 407, 408 (1999).

Eligible to vote are those employees who:

(a) were employed within the above unit during the payroll period ending immediately preceding the date of this Decision, or

(b) have been employed for a total of 30 days or more within the above unit within a period of 12 months immediately preceding such eligibility date, or

(c) have been employed within the above unit during the 12 months immediately preceding such eligibility date for less than 30 days, but for at least 45 days during the 24 months immediately preceding such eligibility date, and

(d) have not been terminated for cause or quit voluntarily prior to the completion of the last project for which they were employed.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Sheet Metal Workers' International Association Local Union No. 20, a/w Sheet Metal Workers' International Association, AFL-CIO.

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of this Decision. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 25's Office, Room 238, Minton-Capehart Federal Building, 575 North Pennsylvania Street, Indianapolis, Indiana 46204-1577, on or before **June 4, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by June 11, 2003.

Signed at Indianapolis, Indiana, this 28th day of May, 2003.

/s/ Roberto G. Chavarry

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